IN THE CIRCUIT COURT OF McDOWELL COUNTY, WEST VIRGINIA

TERESA ESTEP and
TERRY ESTEP, her husband, **PLAINTIFFS**

V. **CIVIL ACTION NO. 02-C-228**

MIKE FERRELL FORD LINCOLN-MERCURY, INC., a West Virginia Corporation, FORD MOTOR COMPANY, a foreign corporation doing business in West Virginia, **DEFENDANTS.**

ORDER DENING MOTION FOR JUDGMENT AS A MATER OF LAW OR IN THE ALTERNATIVE FOR A NEW TRIAL

On the 9th day of March, 2007, came the plaintiffs by Guy R. Bucci and Pamela A. Lambert, their attorneys, and also came the defendants by Robert P. Lorea and Michael Bonasso, their attorneys, pursuant to the defendants' Motion For Judgment As a Matter Of Law Or In The Alternative For A New Trial. The Court proceeded to hear oral arguments on behalf of the plaintiffs and the defendants.

After reviewing the oral arguments, the motions, the memorandum of law and the responses thereto, Count hereby **ORDERS** that the defendant's Motion For Judgment As a Matter Of Law Or In The Alternative For A New Trial is **DENIED.**

This case involves a single car accident when plaintiff/driver Teresa Estep lost control of her Ford Ranger on a slippery highway, went over the bank, crashed into a tree and landed in Tug Fork River. The driver's side air bag failed to deploy. She sustained serious injuries.

A jury trial began with jury selection on November 9, 2006 and ended when the jury rendered a verdict in favor of plaintiff Teresa Estep in the amount of $993,076.64 against the defendants. The

jury heard testimony from witness for both plaintiffs and defendants, including expert witness testimony from both plaintiffs and defendants. The jury found that the airbag system in the 1999 Ford Ranger was defective and this was the proximate cause of the plaintiff's injuries.

Rule 50 of the West Virginia Rules of Civil Procedure relates to motions for judgment as a matter of law in jury trials.

In considering whether a motion for judgment notwithstanding the verdict under Rule 50 (b) WVRCP should be granted, the evidence should be considered in the light most favorable to the plaintiff, but, if it fails to establish a prima facie right to recover, the court should grant the motion. *Huffman v. Appalachian Power Co.*, 187 W. Va. 1, 415 S.E.2d 145 (1991); *First Nat'l Bank v. Clark*, 191 W. Va. 623, 447 S.E.2d 558 (1994).

In cases where the evidence is such that the jury could have properly found for either party upon the factual issues in the case, a motion for a judgment notwithstanding the verdict should not be granted. *Morgan v. Bottome*, 170 W. Va. 23, 289 S.E.2d 469 (1982).

In reviewing the evidence in the light most favorable to the plaintiffs, the Court cannot say that the plaintiffs failed to establish a prima facie right to recover. There was sufficient expert evidence submitted by the plaintiffs to support the jury verdict.

Rule 59 WVRCP governs motions for a new trial.

A trial judge should rarely grant a new trial; a new trial should be granted only where it is reasonably clear that prejudicial error has crept into the record or that substantial justice has not been done. *Morrison v. Sharma*, 200 W. Va. 192, 488 S.E.2d 467 (1997).

Absent a showing of bias or prejudice, a new trial is unwarranted when: (1) there has been a full trial on the merits, (2) there is no obvious error during the original proceedings, (3) the record shows it is extremely unlikely the prejudice could have affected the trial, and (4) the failure to

disclose facts leading to a disqualification motion was inadvertent. *Tennant v. Marion Health Care Found., Inc.*, 194 W. Va. 97, 459 S.E.2d 374 (1995).

All parties were allowed to present and fully develop their case. Expert witnesses were allowed to present their interpretation of the evidence and the parties were allowed to cross exam opposing experts. The parties presented the facts as they believed them to be. The jury listened to the evidence and made their decision.

Finally, defendants complain that the Court's preclusion of seatbelt evidence pursuant to § 17C-15-49 of the Code of West Virginia, as amended, denied them due process as a matter of law. By Order entered January 27, 2006, this Court appealed West Virginia Code § 17C-15-49.

Although West Virginia Code 17C-15-49(a) requires the operator of a passenger vehicle to wear a seat belt, it is West Virginia Code 17C-15-49(d) that relates to its admissibility in a civil action. West Virginia Code 17C-15-49(d) is as follows:

> (d) A violation of this section is not admissible as evidence of negligence or contributory negligence or comparative negligence in any civil action or proceeding for damages, and shall not be admissible in mitigation of damages: Provided, That the court may, upon motion of the defendant, conduct an in camera hearing to determine whether an injured party's failure to wear a safety belt was a proximate cause of the injuries complained of. Upon such a finding by the court, the court may then, in a jury trial, by special interrogatory to the jury, determine (1) that the injured party failed to wear a safety belt and (2) that the failure to wear the safety belt constituted a failure to mitigate damages. The trier of fact may reduce the injured party's recovery for medical damages by an amount not to exceed five percent thereof. In the event the plaintiff stipulates to the reduction of five percent of medical damages, the court shall make the calculations and the issue of mitigation of damages for failure to wear a safety belt shall not be presented to the jury. In all cases, the actual computation of the dollar amount reduction shall be determined by the court.

There is a two part analysis to section (d). The first part states that a violation of 17C-15-49, which is the failure to wear a seat belt, is not admissible as evidence of negligence or contributory

negligence or comparative negligence in any civil action or proceeding for damages, and shall not be admissible in mitigation of damages. This language plainly relates to negligence and damages.

The second part of section (d) relates to causation. It says that the Court is to conduct an *in camera* hearing to determine whether the injured party's failure to wear the safety belt was a proximate cause of the injuries complained of. Upon the Court finding that the failure of the injured party to wear the seat belt was a proximate cause of the injured party's injuries, then the Court is to submit two interrogatories to the jury, unless the injured party stipulates to a reduction of five percent 5% of medical damages. In other words evidence of not wearing the seat belt is admissible for the purpose of causation, unless the injured party stipulates to the five percent (5%) reduction of medical expenses. If the injured party stipulates to the five percent (5%) reduction, then the evidence of not wearing the seat belt is not admissible for the purpose of causation. This is the plain language of the statute.

Once the injured party stipulates to the five percent (5%) reduction, then evidence of not wearing a seat belt is not admissible. Plaintiffs stipulated to the five per cent (5%) reduction, which the Court applied to the verdict. This statute was enacted well over ten (10) years ago and this Court does not believe that it is unconstitutional.

This Court believes that the matters set forth in defendants' Motion For Judgment As a Matter Of Law Or In The Alternative For A New Trial are without merit and should be denied.

It is hereby **ORDERED** and **ADJUDGED** that the defendants' Motion For Judgment As a Matter Of Law Or In The Alternative For A New Trial is **DENIED**.

The Defendants object and excepts to the ruling of the Court.

The Clerk is directed to mail a copy of this order to plaintiffs' attorneys Guy R. Bucci, Esq., at his mailing address of P. O. Box 3712, Charleston, WV 25337 and to Pamela A. Lambert, Esq.,

at her mailing address of P. O. Drawer 926, Gilbert, WV 25621; and to mail a copy to defendants' attorneys Michael Bonasso and Robert P. Lorea, at their mailing address of Flaherty, Sensabaugh & Bonasso, P.L.L.C., P. O. Box 3843, Charleston, WV 25338-3843.

ENTER this 14th day of March, 2007.

Rudolph J. Murensky II

RUDOLPH J. MURENSKY, II